

U.S. Department  
of Homeland Security

United States  
Coast Guard



Director  
National Pollution Funds Center

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16480  
June 21, 2021

## MEMORANDUM

From: (b) (6) (b) (6)  
Claims Manager, National Pollution Funds Center (NPFC)

To: (b) (6)  
Fleet Environmental Coordinator, Department of the Navy (DON)

Subj: Claim Number: A11033-OD01 – *Naval Base Ventura Co (Point Mugu) Oil Spill*  
Assessment and Restoration Costs

1. On March 29, 2019, the NPFC received a claim from DON, on behalf of itself, the Department of the Interior (DOI), and the California Department of Fish and Game (CDFG), for past assessment and future costs to restore damages resulting from *the Naval Base Ventura Co (Point Mugu) oil spill*. The claim totaled \$1,183,092, which included \$335,049 in past assessment costs and \$848,043 to implement the compensatory restoration project. On November 13, 2019, DON reduced their claimed past costs by \$3,387, resulting in total claimed costs of \$1,179,705.

2. Through the enclosed determination, the NPFC offers \$69,568 as compensation for natural resource damages for past assessment costs. This determination was made in accordance with the Oil Pollution Act (OPA, 33 U.S.C. §2701 *et seq.*), the OPA claims regulations (33 C.F.R. Part 136).

3. If you accept this offer, please complete the enclosed Acceptance/ Release Form and return it to:

Director (cn)  
National Pollution Funds Center  
U.S. Coast Guard Stop 7605  
2703 Martin Luther King Jr. Ave. SE  
Washington, DC 20593-7605

4. If we do not receive the signed Acceptance/ Release Form within 60 days of the date of this memo, the offer is void. If the offer is accepted, your payment will be processed within 30 days of receipt of the Release Form. Please provide account information and instruction for the transfer of funds to DOI's Natural Resource Damage Assessment and Restoration Fund account with the signed form.

Subj: Claim A11033-OD01 – *Naval Base Ventura Co (Point Mugu)* Oil Spill Assessment and Restoration Costs

6. If you have any questions about this determination, please feel free to contact me at (b) (6)

Enclosures: (1) NPFC determination  
(2) Acceptance/Release Form

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## National Pollution Funds Center Determination

Claim Number and Name:	<b>A11033-OD01</b> – <i>Naval Base Ventura Co (Point Mugu) Oil Spill Assessment and Restoration Costs</i>
Claimant:	Department of the Navy (DON)
Claim Type:	NRDA, Past Assessment and Upfront Restoration Costs
Amount Requested:	\$1,179,705
Offer Amount:	\$69,568
Date:	June 21, 2021
NPFC Claims Manager:	(b) (6)

### Summary of the Incident and Removal Activities

On May 18, 2011, an airplane owned and operated by Omega Aerial Refueling Services, Inc., and under contract with the Navy, crashed during a failed takeoff from Point Mugu Naval Airstation located at Naval Base Ventura County, Point Mugu, California<sup>1</sup>. The plane crashed in a marsh area<sup>2</sup> adjacent to the end of the runway while carrying at least 10,000 gallons of jet fuel (JP-8) to provide aerial refueling of Navy F/A-18s<sup>3</sup>. The crash resulted in a discharge of jet fuel into the marsh and a large fire. All three passengers escaped with minor injuries. Debris and parts of the plane were scattered by the crash and trenches were dug as the plane impacted and slid through the marsh. The remaining fuselage of the plane was left partially buried holding 2000 gallons of jet fuel in the right wing. At the time of the incident, the Federal On-Scene Coordinator determined that Omega Aerial Refueling Services, Inc.<sup>4</sup> (Omega) was the responsible party (RP) for the incident.

Following the plane crash, a Unified Command consisting of representatives from the Department of the Navy (DON), California Department of Fish and Wildlife (CDFW), U.S. Coast Guard, Department of the Interior (DOI), and the RP was established to respond to the plane crash, resulting fire, and discharge of oil. Emergency crews were immediately dispatched to extinguish the fire. More extensive response activities were conducted on May 19, 2011 to limit the spread of oil to additional wetlands by placing sandbags around the plane fuselage and over culverts connecting the impacted marsh to additional wetland areas<sup>5</sup>. Surveys by the response were conducted to identify the presence of plane debris, fuel, and oiled wildlife.

After recovering the jet fuel remaining in the right wing, salvage operations to remove the scattered crash debris, as well as the remnants of the burned plane fuselage began in early June 2011. Smaller pieces of the plane and debris were dug out of the marsh and collected by hand. A temporary road was created; heavy equipment, including cranes and trucks, were required to cut the fuselage into pieces, lift the pieces out of the marshy habitat, and transport them away.

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<sup>1</sup> SITREP-POL, Sector Los Angeles/Long Beach 180000Z May 11 - 212359Z APR 20

<sup>2</sup> Marsh habitat located within the Mugu Lagoon wetlands

<sup>3</sup> National Transportation Safety Board Aircraft Accident Report, Accident Number: DCA11PA075, Adopted January 2, 2013

<sup>4</sup> Wholly owned subsidiary of Omega Air, Inc.

<sup>5</sup> The process of using sandbags to restrict water passage is also known as “tidal muting”

An initial assessment study to determine the extent of sediment contamination from petroleum and other plane pollutants was conducted in the area surrounding the area of the plane fuselage.<sup>6</sup> The level of contamination was found to be at levels that posed a continuing risk to the environment and human health; accordingly, 1,965 tons of contaminated sediment were excavated and backfilled with soil from other locations on the Base.<sup>7</sup> The RP funded all response activities, which included the emergency fire response, use of sandbags, salvage of the plane, and excavation and replacement of the contaminated soil. Response actions were completed in January 2012 following testing to confirm that contamination to the site had returned to acceptable human and ecological health levels.<sup>8</sup>

### **Natural Resource Damage Claim to the Fund**

On March 29, 2019, the NPFC received a claim from DON, on behalf of itself, DOI, and CDFW, for past assessment and future costs to restore injured resources resulting from the *Point Mugu* incident. The claim, supported by the “Final Damage Assessment and Restoration Plan/Environmental Assessment for the 18 May 2011 Omega 707 Air Tanker Crash” (The Plan), totaled \$1,183,092, which included \$335,049 in past assessment costs and \$848,043 to implement the compensatory restoration project. On November 13, 2019, DON reduced their claimed past costs by \$3,387, resulting in total claimed costs of \$1,179,705. This determination presents the NPFC’s findings with respect to all costs for future compensatory restoration and past assessment activities presented in the Claim.

### **Natural Resource Trustee Claimants**

DON, DOI, and CDFW, as federal and state natural resource trustees, submitted the claim to the Oil Spill Liability Trust Fund (the Fund) for natural resource damages.

Federal natural resource trustees are designated by the President, pursuant to OPA (33 U.S.C. §2706(b)(2)). DON, under the authority of the Secretary of Defense, and DOI are appropriate federal natural resource trustees pursuant to the President’s designation of federal trustees under OPA, Executive Order 12777 (56 Fed. Reg. 54757, October 22, 1991), and Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (40 C.F.R. §300.600) and Section 1006(b)(2) of OPA. 33 U.S.C. §2706(b)(2). The Secretary of Defense’s trustee authority was delegated to Chris Stathos, Fleet Environmental Coordinator<sup>9</sup> for this incident.

The Governor of each State shall designate State and local officials who may act on behalf of the public as trustee for natural resources under this Act. 33 U.S.C. § 2706(b)(3). In the case of California, CDFW is an appropriate trustee pursuant to a letter of designation from the Governor of California<sup>10</sup>.

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<sup>6</sup> Technical Memorandum For Sediment Sampling at Omega Boeing 707, Crash Site Naval Base Ventura County Point Mugu, Point Mugu, California (Insight 2011)

<sup>7</sup> Remedial Action Activity Report for Omega Air Crash Site, (Insight) 2012

<sup>8</sup> *Id.*

<sup>9</sup> See June 16, 2011 Memo signed by Rear Admiral W.D. French (Commander, Navy Region Southwest)

<sup>10</sup> Letter from the Governor of California to NPFC, dated October 16, 1997.

In this case DON, DOI, and CDFW established that they are appropriate trustees for this claim to the Fund. By agreement of the Trustees, DON was the lead federal trustee.

### **Jurisdictional Requirements for Claims to the OSLTF**

Claims to the Fund for uncompensated removal costs or damages must result from a discharge of oil or a substantial threat of discharge, of oil from a vessel or facility into navigable waters of the United States after August 18, 1990.<sup>11</sup>

In this case there was a discharge of approximately 8000 gallons of jet fuel into a marsh area near a landing field at Point Mugu, California, with a substantial threat of discharge of an additional 2000 gallons of jet fuel from the plane on May 18, 2011. The discharge was into a marshy area on the southern end of the Point Mugu Airfield and on the western end of the Mugu Lagoon, adjacent to the runway at Point Mugu. The Mugu Lagoon is part of an estuary that is impacted by Pacific Ocean tidal changes and flows directly into the Pacific Ocean at the end of the Calleguas Creek.

The discharge of oil was from the Omega air tanker, which in this case is a facility under OPA. A “facility” means “any structure, group of structures, equipment, or device (other than a vessel) which is used for...storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes.” 33 U.S.C. §2701(9).

The air tanker, a structure, was used to store jet fuel and to transfer that fuel to airborne Navy aircraft. In this case the air tanker is an OPA facility because it transferred oil from one place to another. *Power Authority of the State of New York v. M/V Ellen Bouchard et al*, 968 F. 3d 165, 171-72 (2<sup>nd</sup> Cir. 2020) (OPA did not write such limitations as the exploration, transportation, and production of oil as the only uses into its definition of a facility. Transfer may mean to convey from one person, place or situation to another and one purpose for the underwater cables was to transfer dielectric fluid; thus they met the definition of an OPA facility.)

This claim meets the OPA jurisdictional requirements for presenting a claim to the Fund.

### **The Fund and General Claim Requirements**

The Oil Spill Liability Trust Fund (the Fund) shall be available to the President for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages. 33 U.S.C. 2712(a)(4). “Damages” include “injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.” 33 U.S.C. §2702(b)(2)(A).

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<sup>11</sup> See section 1020 of Pub.L. 101-380.

The President promulgated regulations for the presentation, filing, processing, settlement, and adjudication of claims against the Fund. 33 U.S.C. § 2713(e). The Claims Regulations are found at 33 C.F.R. Part 136.

Federal and State trustees shall assess natural resource damages under section 2702(b)(2)(A) under their trusteeship and shall develop and implement a plan for the restoration, rehabilitation, replacement or acquisition of the equivalent of the natural resources. 33 U.S.C. 2706(c)(1) and (2). The measure of damages shall be (A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources; (B); the diminution in value of those natural resources pending restoration, plus (C) the reasonable costs of assessing the damages. 33 USC 2706(d). Costs shall be determined with respect to plans that shall be developed and implemented only after adequate public notice, opportunity for a hearing and consideration of all public comments. 33 USC 2706(c)(5).

The Damage Assessment and Restoration Plan was completed, along with the preferred alternative, on June 6, 2016. DON stated that the public was notified of the draft Plan and the availability to comment via advertisements in the Ventura County Star newspaper and on the DON website. DON stated that no comments were received from the public.

There are periods of limitations on presenting claims to the Fund. 33 USC 2712(h). Claims to the Fund must be presented to the NPFC within three years after the date on which the injury and its connection with the incident in question were reasonably discoverable with the exercise of due care, or within three years from the date of completion of the natural resource damage assessment under OPA (33 U.S.C. §2706(e)), whichever is later. 33 U.S.C. §2712(h)(2), 33 C.F.R. §136.101(a)(1)(ii).

The Trustees submitted this claim to the Fund on March 29, 2019, within the three-year period of limitations. In DON's claim to the NPFC on March 29, 2019, it presented a sum certain claim in writing to the Director, NPFC, and the claim included: an assessment and restoration plan and other claim materials that describe: the injuries to natural resources observed by the Trustees; assessment and restoration planning activities conducted by the Trustees; restoration project methods and project milestones; and level of effort, timeframe, and cost estimates for contractors and agency personnel.

### **Claim Presentment to the Responsible Party**

With certain exceptions all claims for removal costs and damages must first be presented to the responsible party. 33 U.S.C. 2713(a). If each person to whom the claim is presented denies liability or the claim is not settled by payment within 90 days after presentment, the claimant may present the claim to the Fund or commence an action in court. 33 USC 2713(b)(2) and (c).

Claim documentation indicates that the RP was presented with a demand for claimed damages in the amount of \$1,178,584 associated with the Plan on November 22, 2016<sup>12</sup>. In response, the RP offered to settle the natural resource damages in full for \$200,000. The Trustees rejected the

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<sup>12</sup> When presented to the NPFC, the Trustees added \$4,508 in additional costs due to an increase in estimated future costs that would be incurred by DOI to administer recovered funds through the DOI NRDAR Fund.

offer. Later negotiations held with the RP on January 25, 2018 were unsuccessful. When the claim was presented to the Fund on March 29, 2019, more than 90 days had passed without settlement of the claim. Accordingly, the NPFC determines that the \$1,178,584 in claimed damages originally presented to the RP was properly presented to the NPFC.

### **Claimant's Burden of Proof**

Trustees bear the burden of providing all evidence, information and documentation deemed necessary by the Director, NPFC, to support the claim. 33 C.F.R. §136.105(a). To satisfy this requirement, the trustee claimant must submit the plan which forms the basis of the claim, along with sufficient supporting information, including documented costs and cost estimates, so the NPFC can determine that the activities and associated costs are reasonable and appropriate. 33 C.F.R. §136.209(a) and (b).

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.<sup>13</sup> As a result, 5 U.S.C. § 555(e) requires the NPFC to provide a brief statement explaining the basis for a denial. This determination is issued to satisfy that requirement.

The claims adjudication process is also subject to the regulations at 33 CFR Part 136. During the adjudication of claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence and weighs its probative value when determining the facts of the claim. If there is conflicting evidence in the record, the NPFC will make a determination as to what evidence is more credible or deserves greater weight, and finds facts based on the preponderance of the credible evidence. The NPFC is not bound by the findings or conclusions reached by other entities.

### **Description of Trustee Injury Assessment and Quantification**

As part of the response, surveys of the marsh area were undertaken to identify and document observations of oiled and dead biota (crabs and snails). Additionally, impacts to marsh habitat from the plane impact, fire, response to fire and oil, and salvage of the plane were documented.

DON, along with the DOI and CDFW,<sup>14</sup> conducted a natural resource damage assessment (NRDA), separate from response efforts and under their trustee authority, to determine the nature and extent of injuries resulting from the incident and the type and scale of restoration necessary to compensate for the injuries to natural resources. The Trustees conducted site visits to observe

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<sup>13</sup> The court in *Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63, 75 (D.D.C. 2011), characterized the informal adjudication process for OSLTF claims with the following: “[W]hile the OPA allows responsible parties to present a claim for reimbursement to the NPFC, they do not confer upon such parties a right to a formal hearing, a right to present rebuttal evidence or argument, or really any procedural rights at all, *see* 33 U.S.C. §§ 2704, 2708, 2713, an entirely unremarkable fact given that Congress’ overarching intent in enacting the OPA was to ‘streamline’ the claims adjudication process . . . .”

<sup>14</sup> The Trustees invited the RP to participate in a cooperative NRDA, the RP accepted, and the two parties developed a set of mutually agreeable guiding principles for conducting the NRDA. The RP engaged in some limited assessment activities, including reviewing and commenting on trustee documents and attending trustee meetings.

impacted areas and an aerial imagery overflight to assess distribution of oil and marsh vegetation changes.

Based on the earlier observations of oiling and other injuries, the Trustees determined that benthic invertebrates would be a reliable indicator species of the health of the overall marsh habitat. Accordingly, the Trustees conducted a benthic macro invertebrate (BMI) survey to assess the condition of benthic invertebrates and their habitat in impacted areas, as well as unimpacted reference sites<sup>15</sup>. The Trustees took core sediment samples at various locations based on an earlier reconnaissance survey. The samples were sent to the laboratory for processing to identify invertebrate abundance, diversity, and taxa. While collecting the core samples, the surveyors also documented observations of water quality, characteristics and conditions of the physical habitat, and other site observations, such as sheening, petroleum odor, and dead biota.

Using all the data collected and observed during the response and assessment activities, the Trustees employed Habitat Equivalency Analysis (HEA), to quantify the specific injury and the level of restoration required to compensate for the injury. The injury quantification relied on incident-specific observations and literature to quantify the amount of lost marsh services resulting from the incident. Injury parameters incorporated in the HEA include: the geographic extent of habitat service loss (area), the degree of habitat service loss (percent), and the rate of recovery (time).

The Trustees separated the impacted area into 5 distinct zones based on their proximity to the crash site, type and level of injuries observed, and the natural physical boundaries of the marsh. Within each zone, the Trustees described the type of injuries observed, including the results of the BMI, and described the HEA parameters used for each specific zone of injury. As described below, the Trustees determined the acreage and percent of injury in each zone and calculated the discounted service acre years (DSAYS) through HEA.

### Zones 1A and 1B

Collectively, these two interconnected zones experienced the most direct and significant impacts of the plane crash and associated response/salvage actions. The initial crash in these zones caused physical damage to the marsh from the impact of the plane and its continued slide through the marsh. The fire from the plane crash resulted in burnt vegetation and charred macroinvertebrates, as well as significantly increased water and sediment temperatures. Finally, the marsh was contaminated by the release of fuel and other chemicals from the plane, as well as from fire ash.

Additional injuries resulted from the response to the incident and plane salvage. The use of fire retardant contaminated the marsh. The placement of sandbags to restrict the spread of fuel altered tidal flow in the area and degraded the water quality in the marsh. Further physical injuries included trampling, digging, and other disturbances associated with the removal of the plane debris, and impact to the environment from the construction of a temporary road and the

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<sup>15</sup> Mugu Lagoon Plane Crash Site Benthic Macroinvertebrate July 2011 Survey, July 2012 Report

use of heavy equipment to complete salvage of the larger plane remnants. Finally, there was the complete destruction of marsh habitat associated with the excavation of contaminated soil.

The results of the BMI survey further supported significant impacts to Zone 1, including large numbers of recently dead organisms<sup>16</sup> and reduced abundance and diversity of benthic macro-invertebrates compared to other impacted and reference zones. The BMI also indicated that Zone 1 was heavily populated with *Ostracoda*<sup>17</sup>. To quantify the specific level of injuries in Zone 1, the Trustees separated it into two distinct zones.

### *Zone 1A*

Zone 1A consists of two sites that contained the final resting place of the plane fuselage, wing, and other large debris. These areas were immediately affected by the fuel and other contaminants leaking from the plane and plane components melted by the fire. Based on the results of the soil contamination study, Zone 1A represents the area of 0.6 acres that was fully excavated because the surface and subsurface levels of sediment contamination were determined by the response to cause a continuing threat to environmental and human health.

Due to the complete excavation of the entire area, the Trustees considered there to be an initial 100% injury to the marsh habitat. Because excavation activities were not completed until six months after the date of the incident, the gradual recovery did not begin until a year after the incident. The Trustees based their determination of a nine-year injury period on literature values<sup>18</sup> that considered the full range of services that a salt marsh habitat provides and the consideration that this marsh habit had to fully regenerate after the excavation. Using these inputs, the HEA calculated 1.77 discounted service acre-years (DSAY) of injury.

### *Zone 1B*

Zone 1B is an area comprising 8.38 impacted acres that is adjacent to and surrounds the excavated areas in Zone 1A. Zone 1B contains the physical damage and trenching caused by the plane crash and the marsh area impacted by the release of fuel, fire, ash, plane and debris removal, and fire retardant. Additionally, efforts to limit the spread of oil through sandbagging reduced the water quality. Further this marsh area was disturbed and impacted by hand digging for smaller debris and the placement of a temporary road and transport of heavy equipment in the marsh to remove the plane fuselage. Recently dead crabs and snails, burnt vegetation, ash, fuel, and other sheens were observed in the field or from laboratory samples taken throughout the zone.

Based on the observations of significant injury related to the plane crash, response, and the results of the BMI described above, the Trustees estimated the initial percentage injury of the marsh area at 90%. The injury period of 5 years, which included gradual recovery over time, was first based on the 3-5 year life cycle of the type of crabs that were observed dead. This time

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<sup>16</sup> These observations included observations of charred shells and ash inside shells

<sup>17</sup> *Ostracoda* is a seed shrimp that is mobile and has high fertility rates and known as a colonizing species that thrives following habitat disturbances.

<sup>18</sup> Strange et al 2002.

period was consistent with a 2-3 year recovery period of above ground biomass found in literature. The Trustees factored in two additional years of recovery time based on structural damage to the marsh from the plane trajectory and response/salvage, recognizing that those benthic invertebrate populations wouldn't recover until the marsh had structurally recovered. Recovery in this area was delayed by continuing impacts from response/salvage operations. Using these inputs, the HEA calculated 12.35 DSAYS of injury in Zone 1B.

## Zone 2

Zone 2 is an area of 9.64 impacted acres that is directly adjacent to Zone 1B. These two areas were separated by sandbags that were not removed until November 2011 and the completion of excavation activities. This area experienced less direct impacts from the fire, but the marsh area was exposed to fuel and tidal muting related to the sandbags placement. Due to the proximity to Zone 1, some limited collateral damage from response/salvage actions also occurred here. The results of the BMI surveys showed recently dead crabs and snails in higher numbers than in Zones 3 and 4 and the reference zones.

Given that Zone 2 did not experience fire damage, nor the same levels of contamination and physical impacts from the plane and response/salvage, as Zone 1, the Trustees estimated a significantly smaller percentage of injury and decreased recovery time. Based on the zone's documented exposure to oil and water quality changes from tidal muting, slight physical disturbance from response/salvage activities, as well as reduced observations of benthic invertebrate injury resulting from the BMI, the Trustees estimated the level of injury at 10%. The injury period of 3 years, which included gradual recovery over time, was based on the 3-5 year life cycle of the type of crabs that were observed dead, which was consistent with a 2-3 year recovery period of above ground biomass found in literature. Using these inputs, the HEA calculated 1.11 DSAYS of injury in this zone.

## Zones 3 and 4

Zones 3 (28.36 acres) and 4 (27.11 acres) are collectively an area of 55.47 impacted acres that was connected to Zone 1 via culverts. Fuel sheen was observed in these zones<sup>19</sup> and water flow was restricted in these areas from the placement of sandbags over culverts, which impacted water quality. The BMI results for these zones, in comparison to the reference zones, did not support benthic injury; however, the Trustees assert that the differences in habitat and substrate types between the reference zones and Zones 3/4 confounded the results. While the BMI was inconclusive on injury, the Trustees noted that hundreds<sup>20</sup> of dead crab clusters were observed in these zones during the response.

Based on the zone's documented exposure to oil, water quality changes from tidal muting, and the evidence of mass crab deaths the Trustee determined that there was sufficient indicia of injury to the zones. However, given that Zones 3 and 4 did not show injury to vegetation, and the level of injury was expected to be variable in these zones, the Trustees estimated the level of

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<sup>19</sup> The collective area of these zones was larger than 55.47 acres – injury was only quantified for the lower marsh elevations that would have been impacted by the inflow of oil and tidal muting

<sup>20</sup> Death events of this magnitude are not normally observed.

injury at 5%. The injury period of 3 years, which included gradual recovery over time, was based on the 3-5 year life cycle of the type of crabs that were observed dead, which was consistent with a 2-3 year recovery period of above ground biomass found in literature. Using these inputs, the HEA calculated 3.19 DSAYS of injury in these zones.

### All Zones

In total, between all five zones, the Trustees estimated that approximately 74.09 acres of marsh were impacted by the plane crash, fire, release of oil, and the resulting response and salvage activities, which resulted in a total of 18.42 DSAYS of injury as calculated through the Trustees' HEA.

### **OPA Damages**

Removal costs and damages specified in 33 U.S.C. §2702(b) are those that result from a discharge of oil or from a substantial threat of oil that result from such incident. Thus, in order for damages to be paid from the Fund, injuries to the natural resources must result from the oil or substantial threat of a discharge of oil. In this case, some of the injuries to the natural resources resulted from the fire after the plane crashed into the marsh area. Injuries caused by the fire are not reimbursable from the Fund. *Gatlin Oil Company Incorporated v. United States of America*, 169 F.3d 207, 210-211 (4th Cir. 1999) (Damages and response costs related to an oil spill are not compensable if they result from fire damage and not directly associated with the discharge of oil or the substantial threat of a discharge of oil.)

The NPFC raised significant concerns regarding the injuries associated with Zone 1B and requested that the Trustees provide additional information to support that all the claimed injuries and related damages are OPA compensable<sup>21</sup>, i.e., not a result of the fire, nor other causes such as physical impact of the plane, ash, fire retardant, melting plane equipment and other non-oil contaminants from the plane, and removal of crash debris and plane fuselage

On November 13, 2019 the Trustees responded that OPA damages should be broadly interpreted in light of the definition of “incident” in OPA, which provides that an incident is “any occurrence or series of occurrences having the same origin, involving one or more... facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil.” 33 U.S.C. §2701(14). However, the *Gatlin* court agreed with the NPFC that the definition of an “incident” must relate back to the liability provision in 33 U.S.C. 2702(a), which provides that a “responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge of oil into or upon the navigable waters... is liable for the removal costs and damages specified in subsection (b) of this section that results **from such incident.**” (Emphasis provided.) The court explained that the definition of “incident” is not dispositive of OPA compensability, rather 33 U.S.C. §2702(a) provides the applicable standard of compensability, which reflects that liability only attaches to such damages that directly result from the discharge of oil into navigable waters or from a substantial threat of discharge. *Gatlin*, 169 F. 3d at 210-211. Accordingly, damages to habitat in Zone 1B resulting from the fire, including burned biota, sediment and water temperature changes, and water quality changes

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<sup>21</sup> Memo from NPFC to DON dated September 9, 2019

resulting from the fire, are not reimbursable from the Fund because such damages are the result of fire and not the result of a discharge of oil or threat of discharge of oil. Nor are damages associated with the response to the fire, such as toxicity to the marsh from fire retardant.

Habitat injuries from the plane crash in Zone 1B are analyzed similarly under *Gatlin* and are analogous to the damages resulting from a grounding of a vessel and injuries to corals. The NPFC has routinely determined that damages to habitat from the initial grounding of a vessel are not OPA compensable because there was no discharge of oil or substantial threat of a discharge of oil upon grounding.<sup>22</sup> Likewise, the NPFC determines that the damages to the marsh caused by the impact of the plane crash are the result of the initial collision rather than from the discharge of oil or threat of discharge of oil.

With respect to salvage of the plane fuselage and debris, the issue is whether the activities to conduct the removal were to prevent the discharge or substantial threat of a discharge of oil. The NPFC first examined whether the purpose for the salvage or removal of the plane was necessary to prevent, minimize, or mitigate the effects of an oil spill or simply to remove the damaged plane from the environment. 33 U.S.C. §2701(31)<sup>23</sup>. In this case there were two separate plans for plane salvage that were developed and enacted by the RP's contractor – one for small debris removal<sup>24</sup> and one for the larger remaining parts of the plane fuselage<sup>25</sup>. Notably, prior to the initiation of both these salvage plans, the 2000 gallons of oil that remained in the plane fuselage following the crash and fire had already been removed.

The plan for removal of small debris did not address the mitigation or prevention of oil release – only that these salvaged pieces would be decontaminated after their removal from the marsh. Further, the plan for small debris removal specified that the main energy sources they anticipated finding were compressed nitrogen and oxygen cylinders, not oil.

Specifically regarding the salvage of the larger pieces of the plane, the NPFC acknowledges that the areas surrounding the plane still had sorbent boom and sandbags during the course of these activities. While it could be argued that the boom and sandbags were placed to prevent the spread of oil that was entrained around the plane, the documentation provided by the Trustees does not establish that the primary purpose of the removal of the plane was the containment or removal of oil or that it was necessary to minimize or mitigate oil pollution damage to the public health and welfare – rather the primary purpose was the salvage of the plane to remove it from the marsh.<sup>26</sup>

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<sup>22</sup> See Brief for the Appellant in *Gatlin*. The NPFC specifically referenced a hypothetical incident where there was a substantial threat of oil release resulting from a ship grounding. While the NPFC concurred that damages associated with loss of recreation resulting from the grounding were compensable, “The damage to the reef caused by the initial impact, however, is not, since it was caused by the collision, rather than by any threat that the oil would spill...”

<sup>23</sup> Correspondingly, damages from the salvage of a grounded, sunken, or otherwise disabled vessel have not been considered OPA-compensable unless the purpose of the salvage was necessary to prevent, minimize, or mitigate the effects of an oil spill or simply to remove the damaged plane from the environment.

<sup>24</sup> Patriot Environmental Service 2011. Work Plan IIIA Salvage for Omega Air/Point Mugu 707 Site(s).

<sup>25</sup> Patriot Environmental Service 2011. Work Plan IIIB Salvage for Omega Air/Point Mugu 707 Site(s).

<sup>26</sup> NPFC policy directs that the primary purpose of an activity occurring during a response dictates whether a response action would be considered an OPA-compensable removal action. NPFC INSTRUCTION M7300.1A,

The credible evidence in the record does not establish that the removal of debris and the plane fuselage was a removal action, thus any damage to the marsh or natural resources in Zone 1B resulting from the construction of a temporary road, and trampling, digging, or other physical damage to the marsh from these actions are a result of the plane crash itself, and not the result of a release of oil or substantial threat of release.

Notwithstanding their assertion that all injuries associated with the plane crash are OPA-compensable, the Trustees alternately argued in their November 13, 2019 response that, since oil overlapped in areas where injuries from the plane crash, fire, and salvage activities occurred, it would be difficult, if not impossible, to separate and distinguish the causes of the various injuries to the marsh habitat. While the NPFC recognizes the difficulty in differentiating OPA vs non-OPA injuries, the Trustees failed to prove that, given the extensive non-OPA injuries documented by the Trustees in their claim, it was reasonable for the Trustees to apportion all injuries to oil and the response to oil in Zone 1B. In particular, the Trustees description of the fire, which resulted in large areas of burnt vegetation and charred invertebrates, indicate significant non-OPA injuries to the marsh in Zone 1B. Additionally, the large areas of physical injury from the plane crash and salvage are a substantial source of injury. These types of injuries to the physical structure of the marsh were specifically identified by the Trustees as a variable in extending the recovery timeline for the marsh in Zone 1B from 3 to 5 years.

### **NPFC Determination of Claimed Restoration Damages**

As discussed above, the Trustees utilized the HEA method to assess the injuries associated with the *Point Mugu* incident. The NPFC determines that the use of HEA was a reasonable and appropriate method to assess injuries resulting from the *Point Mugu* incident. HEA is a commonly used and reliable technique to quantify habitat level injuries and scale restoration for comparable habitats<sup>27</sup>. Furthermore, sufficient data exists to provide the HEA with inputs that could result in a reasonably supported injury determination for the *Point Mugu* incident.

The NPFC determines that the Trustees provided sufficient documentation to prove that the damages claimed for Zones 2 through 4 were the result of oil and/or response actions to restrict the spread of oil via tidal muting. Additionally, the Trustees provided sufficient documentation to prove that damages claimed in Zone 1A were the result of OPA compensable excavation actions to remove oil contamination from marsh areas that are part of the waters of the United States. The Trustees provided sufficient documentation from the field and literature to support the injury inputs used in the HEA to quantify injuries in Zones 2, 3, 4 and 1A.

However, as detailed in the previous section, the NPFC determines that the Trustees failed to establish that the injuries quantified in Zone 1B, which account for 70% of the overall injury and corresponding restoration project, are all OPA-compensable. Given that the denied area of

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Technical Operating Procedures for Determining Removal Costs Under The Oil Pollution Act of 1990, pg. 37 (April 19, 2018).

<sup>27</sup> NOAA.1995. Habitat Equivalency Analysis: An overview, Damage Assessment and Restoration Program, March 21, 1995 (revised October 4, 2000)

injury accounts for such a significant portion of the claimed damages and the singular restoration project<sup>28</sup>, claimed costs to implement the restoration project totaling \$848,043 are denied.

The Trustees may, on reconsideration, provide documentation that rescales the restoration project to a level that will restore injuries isolated to Zones 1A, 2, 3, and 4 and allows for the partial payment of claimed restoration funding.

### **Past Assessment Costs**

DON claimed \$331,662 in past costs for DON (\$254,508), CDFG (\$55,325), and DOI (\$21,820.19). The Plan and associated claim materials document that the Trustees' past costs were incurred for: (1) legal support for assessment and restoration planning activities (2) compilation and evaluation of assessment information, (3) development of HEA and restoration scaling, (4) conducting the BMI survey, (5) development and evaluation of restoration options, and (6) coordination and other administrative tasks.

With respect to DON costs, the NPFC detailed the requirements for labor reimbursement and requested that DON provide such information, which includes name of employee, number of hours worked, work accomplished by each employee, and the full accounting and description of all indirect charges.<sup>29</sup> DON failed to provide the requested documentation to support their labor costs and thus all claimed costs in the amount of \$254,508 are denied.

DOI's claimed costs included \$21,829.19 for labor and indirects. Labor and indirect costs were supported by agency timesheets, descriptions of work for each employee, and documentation of indirect cost calculation methods. However, the description of work for \$4,160 of the claimed costs was documented as "response operations". Accordingly, only \$17,669<sup>30</sup> of the claimed costs are compensable.

CDFG's claimed costs included \$51,450.29 for labor, \$985.66 for travel, and \$199.5 for administrative costs. Travel was supported by signed travel vouchers, however, \$471.31 of the claimed costs were for an attorney, (b) (6) to attend a settlement meeting. The NPFC does not pay for costs specifically related to settlement, therefore only \$514.35 in travel costs is compensable. Labor was supported by agency timesheets and descriptions of work for most all employees. However, descriptions of work for (b) (6) and (b) (6) were not provided, resulting in denial of \$844.25 of claimed labor costs. Additionally, \$1,911.15 in labor costs for (b) (6) was associated with time period during the settlement meeting and therefore denied. Lastly, the \$199.50 in administration costs was denied because there was no documentation and/or explanation to support the charges.

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<sup>28</sup> The Trustees' preferred compensatory restoration alternative is to install culverts to enhance the productivity of a separate wetland area located in Point Mugu by connecting the land parcel to a tidally influenced drainage channel.

<sup>29</sup> Email from NPFC to DON, dated September 9, 2019

<sup>30</sup> The NPFC notes that DOI included \$31,829.19 in documented costs, but only claimed \$21,829.19 due to \$10,000 of previously received compensation. Without further clarity on how the \$10,000 was applied to the costs, the NPFC is unable to determine that the \$21,829.10 in claimed past costs did not include costs related to "response operations".

Although DON did not prove their claim to support restoration, the NPFC has determined that DON provided sufficient evidence that: proceeding with the NRDA was warranted, the assessment process utilized by the Trustees was appropriate, and the associated costs were reasonable. Therefore the NPFC has determined that the \$69,568 in documented past assessment costs are compensable in accordance with 33 C.F.R. §136.211(a). The remaining \$262,094 in undocumented and uncompensable costs are denied.

## **Summary**

The NPFC has reviewed the Claim submitted by DON for past assessment costs and future costs to implement its compensatory restoration project for the *Point Mugu* incident in accordance with OPA (33 U.S.C. §2701 et seq.) and associated OSLTF Claims Regulations (33 C.F.R. Part 136). Through this determination, the NPFC approves past assessment costs of \$69,568 incurred by the Trustees and denies claimed costs in the amount of \$848,043 for future restoration implementation and \$262,094 in past costs. .

## **Reconsideration of Denied Costs**

Through this determination, the NPFC has denied \$1,110,137 for restoration project implementation and past assessment costs.

DON may make a written request for reconsideration of this determination. The reconsideration request must be received by the NPFC within 60 days after the date of this determination or 30 days after receipt, whichever is sooner. The request for reconsideration must be in writing and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. Reconsideration will be based upon the information provided and a claim may be reconsidered only once. Disposition of the reconsideration will constitute final agency action. All correspondence should include the corresponding claim number A11033-OD01.

## **Revolving Trust Fund and Return of Unused Funds to the OSLTF**

Sums recovered under OPA by a Federal, State, Indian, or foreign natural resource trustee for natural resource damages under section 2702(b)(2)(A) shall be retained by the trustee in a revolving trust account, without further appropriation, for use only to reimburse or pay costs incurred by the trustee under subsection (c) with respect to the damaged natural resources. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the Fund. 33 U.S.C. §2706(f).

At DON's instruction, NPFC will deposit the \$69,568 of approved funding into DOI's NR DAR Fund, which DOI has demonstrated<sup>31</sup> to be a non-appropriated, revolving trust fund.

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<sup>31</sup> The Department of the Interior and Related Agencies Appropriation Act, 1992 (H.R. 2686/P.L. 102-154) permanently authorized receipts for damage assessment and restoration activities to be available without further appropriation until expended. The Dire Emergency Supplemental Appropriations for Fiscal Year 1992

U.S. Department  
of Homeland Security

**United States  
Coast Guard**



Director  
United States Coast Guard  
National Pollution Funds Center

CG National Pollution Funds Center  
US Coast Guard STOP 7605  
2703 Martin Luther King Jr Ave. SE  
Washington, DC 20593-7605  
Staff Symbol: (CN)  
Phone: (b) (6)  
E-mail: (b) (6)

Claim Number: A11033-OD01

Claimant Name: Department of the Navy

On March 29, 2019, the Department of the Navy (DON) on behalf of itself, the Department of the Interior (DOI), and the California Department of Fish and Game (CDFG), presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the amount of \$1,183,092 for past costs to assess natural resource damages resulting from the *Naval Base Ventura Co (Point Mugu)* oil spill and to implement compensatory restoration. The NPFC assigned Claim Number A11033-OD01 to this claim. On November 13, 2019, DON reduced its claimed costs to \$1,179,705 for past assessment costs (\$331,662) and to implement restoration (\$848,043).

DON, DOI, and CDFG accept the NPFC's settlement offer of \$69,568 as full, final and complete settlement and satisfaction for all natural resource damages and associated costs adjudicated in the June 21, 2021 determination (A11033-OD01).

DON, as the Federal Lead Administrative Trustee, shall comply with 33 U.S.C. § 2706(f) by ensuring that all funds awarded in the June 21, 2021 determination are deposited into DOI's revolving trust account.

DON, DOI, and CDFG hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that they have against any party, person, firm or corporation that may be liable for the payment of the \$69,568 paid from the Fund for Claim Number A11033-OD01. DON, DOI, and CDFG authorize the United States to bring suit, compromise or settle in the name of the Trustees and for the United States to be fully substituted for, and subrogated to all rights arising from, and associated with this amount paid by the Fund for which each Trustee is compensated under this settlement. Each Trustee warrants that no legal action has been brought regarding this matter, and no settlement has been made by them or any person acting on their behalf with any other party for amounts which are the subject of this claim against the Fund.

Each Trustee warrants that no settlement will be made by any person on their behalf with any other party to recover the compensation paid by the Fund for the June 21, 2021 determination without consultation with the NPFC.

Upon acceptance of this offer the Trustees will cooperate fully with the NPFC in any claim and/or action by the United States against any person or party to recover the compensation paid by the Fund. Cooperation shall include, but not be limited to, immediately reimbursing the Fund any compensation received from any other source for the same claim, and providing any documentation, evidence, testimony, and other support, as may be necessary for the NPFC to recover from any other party or person.

DON, DOI, and CDFG certify that to the best of their knowledge and belief that the information contained in this claim represents all material facts and is true, and it understands that misrepresentation of facts is subject to prosecution under federal law including, but not limited to, 18 U.S.C. §§287 and 1001.

<b>FOR THE DEPARTMENT OF THE NAVY</b>	
_____	_____
Title of DON Authorized Representative	Date of Signature
_____	_____
Name of DON Authorized Representative	Signature

<b>FOR THE DEPARTMENT OF THE INTERIOR</b>	
_____	_____
Title of DOI Authorized Representative	Date of Signature
_____	_____
Name of DOI Authorized Representative	Signature

<b>FOR THE CALIFORNIA DEPARTMENT OF FISH AND GAME</b>	
_____	_____
Title of CDFG Authorized Representative	Date of Signature
_____	_____
Name of CDFG Authorized Representative	Signature